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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMCO INSURANCE COMPANY, Plaintiff and Appellant, v. NINJIN JAPANESE RESTAURANT et al., Defendants and Respondents.	B216595 (Los Angeles County Super. Ct. No. SC097005)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman P. Tarle, Judge. Affirmed.

Gelman Law Group and Alexander M. Gelman for Plaintiff and Appellant.

Law Office of Priscilla Slocum, Priscilla Slocum; Early, Maslach & Rudnicki and James Grafton Randall for Defendants and Respondents.

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INTRODUCTION

Plaintiff Amco Insurance Company (Amco) appeals from a summary judgment in favor of defendants Ninjin Japanese Restaurant and Eun Jean Lim (collectively Ninjin). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2003, Ninjin as lessee entered into a Standard Industrial Lease with Raymond Carriere (Carriere) as lessor for property in Santa Monica. Paragraph 8 covered insurance indemnity. Specifically, paragraph 8.1 provided: "As used in this Paragraph 8, the term 'insuring party' shall mean the party who has the obligation to obtain the Property Insurance required hereunder. The insuring party shall be designated in Paragraph 46 hereof. In the event Lessor is the insuring party, Lessor shall also maintain the liability insurance described in paragraph 8.2 hereof, in addition to, and not in lieu of, the insurance required to be maintained by Lessee under said paragraph 8.2, but Lessor shall not be required to name Lessee as an additional insured on such policy. Whether the insuring party is the Lessor or the Lessee, Lessee shall, as additional rent for the Premises, pay the cost of all insurance required hereunder, except for that portion of the cost attributable to the Lessor's liability insurance coverage in excess of $1,000,000 per occurrence. If Lessor is the insuring party Lessee shall, within ten (10) days following demand by Lessor, reimburse Lessor for the cost of the insurance so obtained." Paragraph 46 identified the lessee, Ninjin, as the insuring party.

Paragraph 8.2 covered liability insurance. Paragraph 8.3 covered property insurance.[1]

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[1] Specifically, paragraph 8.2 required the lessee to "obtain and keep in force" liability insurance. Paragraph 8.3 required the insuring party to "obtain and keep in force" property insurance and specified what it should cover.

Paragraph 8.5 contained a waiver of subrogation provision as follows: "Lessee and Lessor hereby release and relieve each other, and waive their entire right of recovery against the other for loss or damage arising out of or incident to the perils insured against under paragraph 8.3, which perils occur in, on or about the Premises, whether due to the negligence of Lessor or Lessee or their agents, employees, contractors and/or invitees. Lessee and Lessor shall, upon obtaining the policies of insurance required hereunder, give notice to the insurance carrier or carriers that the foregoing mutual waiver of subrogation is contained in this Lease."

According to the allegations of the complaint, Amco issued a property insurance policy to Carriere covering the leased property. On February 26, 2006, there was a fire at the property caused by Ninjin's negligence. Carriere made a claim on the policy, and Amco paid Carriere $297,313.40.

Amco then sued Ninjin to recover the money paid to Carriere. Ninjin moved for summary judgment based on paragraph 8.5 of the lease. Amco opposed summary judgment on several grounds but submitted no evidence in opposition to the motion. Instead, it argued that other provisions of the lease created factual questions. The trial court rejected these arguments and found Amco failed to make a prima facie showing of a triable issue of fact. It granted summary judgment for Ninjin.

DISCUSSION

Summary judgment properly is granted if there is no question of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849.) The defendant must "demonstrate that under no hypothesis is there a material factual issue

requiring a trial." (*Rosenblum v. Safeco Ins. Co*. (2005) 126 Cal.App.4th 847, 856; accord, *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) The plaintiff may not rely on his or her pleadings to meet this burden (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, at p. 849), except to the extent they are uncontested by the opposing party (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 626). All doubts as to the propriety of granting the motion are resolved in favor of the opposing party. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

The papers submitted by the parties must set forth evidentiary facts. (*Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, 67; see also *Miller v. Bechtel* (1983) 33 Cal.3d 868, 874.) "Mere conclusions of law or fact are insufficient to satisfy the evidentiary requirements for a summary judgment. . . ." (*Perkins v. Howard* (1991) 232 Cal.App.3d 708, 713; *Sheppard*, *supra*, at p. 67.) The purpose of the papers submitted on the motion is to show a party "has sufficient proof of the matters alleged to raise a question of fact." (*Gribin Von Dyl & Associates, Inc. v. Kovalsky* (1986) 185 Cal.App.3d 653, 663.)

On appeal from a summary judgment, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We must uphold the judgment if it is correct on any ground, regardless of the reasons the trial court gave. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.)

The only evidence submitted on the summary judgment motion was a copy of the lease submitted by Ninjin, and on which Ninjin relied. Amco submitted no evidence in opposition to the motion.

Amco first contends there is a triable issue of fact "as to the validity of any provision seeking to excuse the negligence of the tenant." The sole case it cites in support of its contention, *Fire Ins. Exchange v. Hammond* (2000) 83 Cal.App.4th 313, does not assist it.

In *Fire Ins. Exchange v. Hammond*, *supra*, the court noted that "'[i]n the case of insurance, subrogation takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss which the insurer has both insured and paid.' [Citation.] 'The right of subrogation is purely derivative. An insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured. The subrogated insurer is said to "'stand in the shoes'" of its insured, because it has no greater rights than the insured and is subject to the same defenses assertable against the insured. Thus, an insurer cannot acquire by subrogation anything to which the insured has no rights, and may claim no rights which the insured does not have.' [Citation.]" (83 Cal.App.4th at p. 317.)

The court pointed out that "[i]n California, courts have held that a lessee is not responsible for negligently caused fire damages where the lessor and lessee intended the lessor's fire policy to be for their mutual benefit." (*Fire Ins. Exchange v. Hammond*, *supra*, 83 Cal.App.4th at p. 317.) That is the case here.

The lease required property insurance, for which Ninjin as lessee was to pay. (Pars. 8.1, 8.3.) Paragraph 8.5, the waiver of subrogation provision, by its language makes it clear that Carriere and Ninjin intended that the property insurance be for their mutual benefit, and they did not intend that Ninjin be liable to Carriere for negligently caused damages to the property: "Lessee and Lessor hereby *release and relieve each other*, and waive their entire right of recovery against the other for loss or damage arising out of or incident to the perils insured against under paragraph 8.3, which perils occur in, on or about the Premises, whether *due to the negligence* of Lessor or Lessee or their agents, employees, contractors and/or invitees." According to the principles expressed in *Fire Ins. Exchange v. Hammond*, *supra*, 83 Cal.App.4th at page 317, Ninjin is not liable

to Carriere for fire damages caused by its negligence, and Amco as insurer therefore has no right of subrogation to pursue Ninjin for the loss.

Amco argues that Ninjin is using the waiver of subrogation provision "as an escape and release of [its] responsibility under the lease and [its] negligence. [It is] alleging that [it] can be negligent, but if [Carriere] bought insurance, even though [Ninjin was] the one[] who [was] to pay for the loss and have insurance, that [it] can be excused from the breach of contract and negligence. This would never have been the intent of the parties under any stretch of the imagination." (Emphasis omitted.)

Amco's argument rests on a faulty premise—that Carriere paid for the insurance and bore the burden of Ninjin's negligence. Under the contract, however, as stated above, although Carriere purchased the insurance, Ninjin was to pay for it in its rent payments. By doing so, Ninjin, not Carriere, bore the responsibility for its negligence. There was nothing contrary to law in this arrangement. (*Fire Ins. Exchange v. Hammond*, *supra*, 83 Cal.App.4th at p. 317.) Further, Amco presented no evidence as to any contrary intent on the part of Carriere or Ninjin. Neither did Amco present evidence that Ninjin did not in fact pay for the insurance.

Amco also argues that "the Waiver was conditioned upon Ninjin insuring against loss and indemnifying as required under the lease. The entire case is based upon Ninjin's failure either individually or through [its] carrier to perform this very task. The condition has not been met for any waiver." Again, Amco presented no evidence Ninjin failed to fulfill its duty to insure against loss as required under the lease.

In summary, Amco failed to meet its burden of providing *evidence* raising a triable issue of material fact as to its cause of action sufficient to preclude summary judgment in Ninjin's favor. (Code Civ. Proc., § 437c, subd. (p)(2); *Perkins v. Howard*, *supra*, 232 Cal.App.3d at p. 713.) It also failed to meet its burden on appeal of showing the trial court erred in granting the summary judgment. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318-319.) Consequently, we must uphold the judgment.

DISPOSITION

The judgment is affirmed. Defendants are to recover costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

SEGAL, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.